Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WILLIAM E. FOSTER
Petitioner

v.

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK,

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Whether the Court of Appeals, in a First Amendment retaliatory discharge case, erred in holding that an employer may sustain its burden of proving the disruptive effects of its employee's speech solely on the basis of its subjective opinion.

PARTIES TO THE PROCEEDINGS

The Petitioner is William E. Foster. The Respondents are City of Southfield, Janet Tobin, Personal Representative of the Estate of Rollin G. Tobin, deceased, and Robert Block.

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Petitioner, William E. Foster, petitions as follows for a Writ of Certiorari to review the December 20, 1996 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment entered by the United States District Court for the Eastern District of Michigan on August 9, 1994.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit entered on December 20, 1996, is an unpublished Opinion. The pertinent portions of the Opinion are made part of the Appendix.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on December 20, 1996.

William E. Foster seeks to invoke the jurisdiction of the Court t to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §1983

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari ("Petition") arises from the complaint filed by Plaintiff-Respondent William E. Foster (hereinafter "Foster") on September 30, 1992, in the United States District Court for the Eastern District of Michigan, alleging a retaliatory discharge claim against his former employer, defendant City of Southfield Fire Department (hereinafter "SFD"), its public safety director, Rollin G. Tobin, and city manager, Robert Block.

The complaint alleged that Foster was terminated on September 8, 1992, because he spoke to the media on the subject of racism and sexism within the SFD. Foster alleged that his speech was protected and that the termination was in violation of his rights as protected under the First Amendment of the United States Constitution. (R.1)

Trial in the matter commenced on July 12, 1994. After twelve days of trial, the jury determined that Foster was terminated because of his speech activities but found that the employer SFD had sustained its burden of proving that plaintiff's speech was disruptive to its operations. Judgment dismissing the case was entered on August 9, 1994. (R. 202) Foster's motion for new trial was denied on December 1, 1994. (R.211) On December 27, 1995, Foster filed a timely notice of appeal from the district

court's judgment dismissing his case. (R.215)

On December 20, 1996, the United States Court of Appeals for the Sixth Circuit announced its decision affirming the judgment of the United States District Court for the Eastern District of Michigan. (Appendix)

B. Facts:

Foster was hired by defendant city in April of 1990, to serve as a public safety reserve coordinator for the SFD. In this job, Foster was responsible for promoting the cadet and reserve programs affiliated with the SFD, and for recruiting qualified minorities and women to join the program. Immediately prior to the hiring of William Foster as its public safety reserve coordinator, the SFD consisted of approximately 105 permanent members, all of whom were white males. Management of the city recognized that recruitment through the testing and selection procedures set forth through the civil service procedures was preventing the desired diversification of its fire department. Mr. Foster was hired to help diversify the department. (Opinion, 2; appendix)

In 1991, the city hired several African-Americans and females as cadets and probationary firefighters. As a result of this diversification, Foster claimed that some of the white male firefighters did not respond well to the new working environment and created a hostile environment for the minorities and women. (Opinion, 2)

In January of 1992, Foster gave a deposition in a state civil-rights suit

brought against the city by female probationary firefighter, Mary Potts. In his deposition, Foster described several instances of racism within the fire department. In March of 1992, plaintiff was interviewed by a local television reporter and stated, on the air, that the SFD was sexist and racist. (Opinion, 3)

After the television news report took place, plaintiff Foster agreed to speak with a newspaper reporter. Foster was quoted as saying that the SFD was ignoring racism at the SFD and that the city's minority hiring plan was a "sham". (Opinion, 3)

On March 23, 1992, Foster wrote a letter to the city administrator, defendant Robert Block, in which he accused the city of being a "do nothing" administration. He also complained that the cadets had become "engine house janitors". He sent a copy of the letter to the media. (Opinion, 3)

On April 29, 1992, public safety director Tobin sent Foster a letter of reprimand criticizing him for his comments to the media. The letter stated that Foster's public statements had compromised his ability to perform his job duties and to act as a representative of the city. (Opinion, 3)

On August 27, 1992, plaintiff filed a state civil-rights action in circuit court. On that day, Foster held a press conference at city hall. He stated that racism existed at the SFD and he did not believe that the SFD wanted to recruit any more minorities. (Opinion, 3)

On September 8, 1992, the city terminated Foster's employment.

Plaintiff Foster commenced this action in the United States District Court claiming that he was terminated in retaliation for engaging in protected First-Amendment speech and, therefore, his termination violated 42 U.S.C. §1983. (Opinion, 3)

At the trial of the matter, the district court determined that plaintiff's speech dealt with the matter of public concern and was, therefore, presumptively protected.

Two questions were submitted to the jury for resolution. First, the jury was asked to consider whether plaintiff's termination was caused by his speech activities. The second question dealt with whether the defendant SFD had satisfied its burden of proof demonstrating that Foster's speech activities were disruptive to the fire department's operations. (R.201)

The jury returned a verdict in favor of Foster on the first question but, determined, in its verdict, that the defendant SFD had met its burden of proof on the issue of whether plaintiff's public speech was disruptive.

The instructions given to the jury by the court were as follows:

> **"Now, the speech as such, of plaintiff, was on matters of public concern. If the speech of plaintiff interfered with the effectiveness of the City of Southfield's operations, or interfered with the performance of plaintiff's job duties, then it was -- it is not protected speech.**
>
> **"In proving its assertion that plaintiff's speech disabled him from performing his job duties, the City, the defendant, must prove by**

> **a preponderance of the evidence that the plaintiff's statements interfered with the effectiveness of the City of Southfield's operations, or in the performance of plaintiff's job.**
>
> **"As to plaintiff's first claim, since his speech dealt with matters of public concern, defendant has the burden of proving, by a preponderance of the evidence, that his speech interfered with the effectiveness of its operations, or interfered with the performance of plaintiff's job."** (Opinion, 5)

Plaintiff objected to the instruction given to the jury contending that the instructions improperly permitted defendants to defeat Foster's First-Amendment claim solely on the basis of the city's opinion and conjecture as to the disruption caused by Foster's speech. Plaintiff's proposed jury instructions, rejected by the trial court, provided in part:

> **"In meeting its burden of proof on this issue, defendant must submit substantial evidence that plaintiff's statements interfered with the effectiveness of defendant's operation or in the performance of his job.**
>
> **"Defendant must establish this point with a showing of actual and significant harm objectively determined.**
>
> **"Mere fear or apprehension of a disturbance is not enough to justify denial of the freedom of expression.**
>
> **"In order to sustain its burden, defendant must have shown sufficient facts upon which it could have reasonably forecast disruption."** (R.203)

The Sixth Circuit Court of Appeals, in affirming the trial court, relied exclusively on *Waters v. Churchill*, 511 U.S. 661,114 S.Ct. 1878, 128 L.Ed.2d 686 (1994)

The Court of Appeals, in affirming the district court judgment, stated:

> **"We hold, therefore, that the jury was entitled to consider defendants' opinions as to the disruptive effect of plaintiff's speech. Such opinions are relevant and could legitimately form the basis for the jury's verdict. The evidence presented by defendants was sufficient to support a finding that plaintiff's statements interfered with his ability to perform his job. We find no error."**

ARGUMENT

THIS PETITION SHOULD BE GRANTED SO THAT THIS COURT CAN REVISIT THE *WATERS* DECISION WHICH HAS BEEN INTERPRETED BY THE SIXTH CIRCUIT, AND OTHER COURTS, TO STAND FOR THE PROPOSITION THAT THE PROTECTED NATURE OF A PUBLIC EMPLOYEE'S SPEECH IS SOLELY DEPENDENT ON THE EMPLOYER'S SUBJECTIVE REACTION TO IT.

In *Waters v. Churchill*, 511 U.S. 661,114 S.Ct. 1878, 128 L.Ed2d 686 (1994), plaintiff, Ms. Churchill, claimed that she had criticized certain substantive training policies of the hospital and, therefor, her speech was protected. Her supervisor, Ms. Waters, claimed that other employees had overheard Ms. Churchill's conversation indicating that plaintiff had made sharp personal criticisms of Waters and, therefore, said Ms. Churchill's speech was not protected.

The Seventh Circuit Court of Appeals said that the inquiry must turn on what her speech actually was, as determined by the jury, not on what the employer thought it was. *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992);*Waters*, 511 U.S. at 694, 114 S.Ct. at 1880.

In reversing the Seventh Circuit, Justice O'Connor's plurality opinion observed that the dispute centered on the factual basis for applying the test set forth in *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed2d 708 (1983) The *Connick* test was described by this court in *Waters* as:

> **"What the speech is, in what tone it was delivered, what the listeners' reactions were - is determined. Should the court apply the Connick test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?"** *Waters*, 511 U.S. 701, 114 S.Ct. at 1884.

The Seventh Circuit's approach, which was rejected by this court, held that the employer's factual conclusions were irrelevant; the jury should engage in its own fact finding. The petitioners in *Waters* contended that the employer's factual conclusions should determine the outcome of the case. Justice O'Connor observed that a "middle course" would mean that the court should "accept the employer's factual conclusions, but only if those conclusions were arrived at reasonably". *Waters*, 511 U.S. 701; 114 S.Ct. at 1884

Justice O'Connor explained that because a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters, the government employer may have to "make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." Id. at 1887

Although this court's opinion in *Waters* split into four opinions, Justice Souters' concurring opinion clarified the decision's meaning in pointing out that "though Justice O'Connor's opinion speaks for just four members of the court, the reasonableness test it sets out is clearly the one that lower courts

should apply." *Waters*, 511 U.S. at 705-706,114 S.Ct. at 1893 (Souter, J., concurring)

Several cases interpreting *Waters*, since it was decided in 1994, illustrate the dangers inherent in the reasonableness test adopted by this court in *Waters*.

In *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994) Wright alleged that defendant took disciplinary action against her in retaliation for her exercising First Amendment rights. Plaintiff, who worked for the Illinois Department of Children & Family Services, had a different and conflicting opinion as to how a case of reported child abuse should be investigated. Over the course of several months, this conflict degenerated into open hostility - characterized by plaintiff's accusing her supervisors of neglecting abused children and violating state law. The supervisors accused the plaintiff of perjury and insubordination. Eventually, the department imposed various disciplinary measures on Wright which resulting in litigation.

During a court hearing involving allegations of child abuse, Wright was called to testify as a witness for the department. Wright's testimony was critical of the department's investigation of the case and also criticized one of her supervisors. Wright was suspended for (30) days because she had repeatedly provided inaccurate or misleading information to the court in her testimony.

In sustaining the District Court's dismissal of Wright's First Amendment claim, the Court of Appeals concluded that plaintiff's employers could punish her for providing truthful testimony that criticized the employer, if they reasonably believed the testimony was false. Id, at 1506.

The Court of Appeals went on to state in a footnote, also citing *Waters*, supra, that the "protected nature of the speech hinges not on it's objective characterization but on the employers subjective reaction to it." Id, at 1506 n.5

The Second Circuit Court of Appeals was required to reconsider it's decision in a First Amendment case involving public speech by a university professor. *Jeffries v. Harelston*, 52 F.3d 9 (2nd Cir. 1995) involved public statements by the Chairman of the Black Studies Department at the City College of New York. Jeffries, the Chairman of the Department, made a public speech in which he addressed the bias of the New York Public School Curriculum and the history of black oppression in public schools. Jeffries also made several derogatory statements concerning Jews. As a result of this public speech, Jeffries term was limited to one year as a professor as opposed to the usual three years. The Court of Appeals originally concluded that Jeffries First Amendment rights had been violated, but was ordered by this court to reconsider it's decision in light of *Waters*.

On remand the Court of Appeals held that the defendant University did not violate Jeffries' First Amendment rights when it disciplined him for

speech that they reasonably believed would disrupt it's University operations. 52 F.3d at 9 The Court of Appeals concluded that *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if; (1) the employers prediction of disruption is reasonable; (2) the potential disruptiveness is enough to out weigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. Id. at 11, 13.

Even though the jury in *Jeffries* specifically found that Jeffries was demoted because of his speech and the jury specifically found that the speech did not disrupt "the effective and efficient operation of the Black Studies Department, the college or the university," the court concluded, as a matter of law, that the speech was not protected because "the defendants were motivated by a reasonable prediction of disruption". Id, at 11, 13.

In *Moore v. City of Wynnewood*, 57 Fd3 924 (10th Cir. 1995). Moore was demoted from his position as deputy chief of police. He alleged that this demotion was in retaliation of his exercise of his First Amendment rights. Moore had spoken, while on duty and in uniform, at a City Council Meeting regarding a recent incident involving two police officers of the Wynnewood Police Department. At the council meeting, Moore stated that the officers involved had followed department procedures. However, Moore also stated that the incident was the culmination of prior problems created by a particular officer.

Although the Court of Appeals concluded that Moore's speech was of a matter of public concern, the court ruled that the speech was unprotected under the First Amendment. The court said that balanced against the importance of Moore's speech are powerful governmental concerns that support the city's ability to take disciplinary measures in response to Moore's speech. Id, at 933. The court reasoned that Moore's statements threatened both the department's morale and its chain of command.

In *Campbell v. Towse,* 992 Fd3 820 (7th Cir. 1996), Campbell was a police officer who wrote a letter to the Chief of Police indicating that he disagreed with the management style and law enforcement philosophy of the department as administered by Chief Jones. Officer Campbell indicated in the letter that he had grave doubts about the wisdom of Chief Jones' decision to institute a Community Policing Program. He further indicated that he objected because he believed that the needs of the non-minority residents of the City of Alton were being slighted.

Citing *Waters*, the *Campbell* Court of Appeals concluded that Chief Jones' interest in maintaining authority over departmental personnel and in being assured that his commands would be respected by Officer Campbell, clearly out weighed Campbell's interest in expressing his views. Id, at 829. The Seventh Circuit decision also concluded that it was reasonable for Chief Jones to loose confidence in officer Campbell and to begin to doubt Campbell's loyalty and/or to conclude that the memorandum was not merely

an expression of philosophical disagreement. In the court's view, the memorandum indicated a significant reluctance on Campbell's part to accept Jones' leadership of the department. Id.at 829.

Some courts have, while paying lip service to *Waters*, clearly ignored the substance of it's holdings. In *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996), plaintiff Andersen was an Intern for the Board of Pardons. In February of 1994, Andersen was interviewed by the TV News and she publicly criticized proposed board changes, expressing her concern that the changes could result in the premature release of potentially dangerous sex offenders. Andersen was fired the following day for violating a written policy that prohibited employees from speaking to the media without prior authorization. Defendant claimed Andersen's speech was unprotected because it undermined the public's confidence in the Department of Corrections.

The *Andersen* court concluded that defendant put forth no evidence to support the District Court's finding that the public criticism undermined public confidence in the Department of Corrections. The court also found there was no evidence that Andersen's non-compliance with the written policy regarding speaking to the public without prior authorization "interfered with the regular operations of the Department of Corrections". Therefore, the court concluded that the District Court judgment in favor of the defendant employer had to be reversed.

The Third Circuit Court of Appeals has applied *Waters* in a similar fashion. *Watters v. City of Philadelphia*, 55 F.3d 886 (3rd Cir, 1995)

It is interesting that both *Andersen* and *Watters*, while acknowledging *Waters*, ignored its holding by requiring the employer make a substantial evidentiary showing that the speech adversely effects the efficiency or effectiveness of it's operations. Id. at 727.

This court has described the responsibility of the judiciary when dealing with First Amendment cases:

> **"In cases raising First Amendment issues, we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'judgment does not constitute a forbidden intrusion on the field of free expression'."**
> *Bose Corp. v. Consumers Union of United States, Inc.* 466 U.S. 485, 499 (1984)

The immediate and far reaching result of the *Waters* decision is clear: this court has essentially turned over to government employers the sole authority to determine which speech it will tolerate in the workplace. As this case demonstrates, a government employer has the ability to curb their employee's speech, even on matters of public concern, through the mere expression of an opinion that the otherwise protected speech may be disruptive to the efficient operation of the government enterprise.

Waters has spawned a dangerous rule: whether a public employee's speech is protected is now determined, for the most part, solely by the

employer's subjective reaction to the speech. The interpretations of *Waters*, as expressed by the Second, Sixth, Seventh, and Tenth Circuits Court of Appeals proves that "reasonable investigation" safeguard envisioned by this court is not working. Government officials, who are often the target for the public criticism, now determine, with only minimal limitation, which speech will or will not be tolerated in the workplace.

CONCLUSION

In reality, *Waters* represents the beginning of an era of overriding restriction on public employees' First Amendment rights in the government workplace. There is a real danger that, if left unechecked, the right of a public employee to engage in protected speech will soon be a historical artifact.

The case presented to the court today represents an opportunity to revisit *Waters* and fully restore the rule of law to free-speech activities in places of public employment before it is gone completely.

It is respectfully requested that this court grant petitioner's writ or certiorari.

By: _____

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DATED: March 20, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM E. FOSTER,

Plaintiff-Appellant
and Cross Appellee

Nos. 95-1032/1072[1]

On Appeal from the
United States District
Court for the Eastern
District of Michigan

CITY OF SOUTHFIELD, a
municipal corporation,
JANET TOBIN, Personal
Representative of the
Estate of ROLLIN G. TOBIN,
Deceased, and ROBERT BLOCK,
its agents, officers and employees,
jointly and severally,

Defendants-Appellees
and Cross Appellants.

WILLIAM E. FOSTER,

Plaintiff-Appellee

No. 1526*

On Appeal from the
United States District
Court for the Eastern
District of Michigan

CITY OF SOUTHFIELD, a
municipal corporation,
JANET TOBIN, Personal
Representative of the
Estate of ROLLIN G. TOBIN,
Deceased, and ROBERT BLOCK,
its agents, officers and employees,
jointly and severally,

Defendants-Appellees

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[1] These appeals were consolidated for argument.

Nos. 95-1032/1072/1526

BEFORE: KENNEDY, JONES and BOGGS, Circuit Judges;

PER CURIAM: Plaintiff William Foster brought this action against his former employer, defendant, City of Southfield ("City"), and two of its employees, defendants Rollin Tobin and Robert Block, claiming that he was wrongfully terminated in retaliation for his exercise of his First Amendment rights and for engaging in activity protected under the Michigan Whistleblowers' Protection Act ("WPA") and Elliott-Larsen Civil Rights Act ("ELCRA"). A jury found in favor of defendants. Plaintiff appeals, claiming that the District Court gave erroneous instructions, inappropriately restricted the scope of plaintiff's case, and erroneously dismissed his WPA claim. Defendants cross-appeal, claiming that the District Court abused its discretion in assessing attorney fees and costs as a sanction against defendants for discovery misconduct. Defendant also appeal the award of attorney fees as a sanction for statements made by defense counsel that prompted the District Court to declare a mistrial.

I. Facts

Plaintiff was hired by defendant City in April of 1990 to serve as a Public Safety Reserve Coordinator for the Southfield Fire Department ("SFD"). Plaintiff, who is African-American, was responsible for promoting the cadet and reserve programs affiliated with the SFD, and for recruiting qualified minorities and women to join the programs.

Although defendant City claims that it had long sought to diversify the SFD, there were no women or minorities among the permanent members of the SFD, there were no women or minorities among the permanent members of the SFD at the time plaintiff was hired. Following the hiring of plaintiff, the City hired several African-Americans and females as cadets and probationary firefighters. Plaintiff contends that some of the white malo firefighters did not respond well to the newly diversified work force and created a hostile work environment for the minorities and women.

In January 1992, plaintiff gave a deposition in a state civil rights suit brought against the City by a female probationary firefighter, Mary Potts. In his deposition, plaintiff described several instances of racism within the fire department. In March 1992, plaintiff told a local television reporter that the SFD was sexist and racist. He recounted several incidents that he perceived as evidence of racism in the SFD.

A few days after this television interview, plaintiff agreed to speak with a newspaper reporter. Plaintiff was quoted as saying that the SFD was ignoring racism at the SFD and that the City's minority hiring plan was a "sham". On March 23, 1992, plaintiff wrote a letter to the City Administrator, defendant Robert Block, in which he accused the City of being a "do-nothing" administration and complained that the cadets had become "engine house janitors." Plaintiff sent a copy of the letter to the media.

On April 29, 1992, Director Tobin sent plaintiff a letter of reprimand criticizing plaintiff for his comments to the media. The letter stated that plaintiff's public statements had compromised his ability to perform his job duties and to act as a representative of the City.

On August 27, 1992, plaintiff filed a civil rights action in Oakland County Circuit Court. On that day, plaintiff held a press conference at City Hall. Plaintiff stated that racism existed at the SFD and that he did not believe the SFD wanted to recruit any more minorities.

On September 8, 1992, the City terminated plaintiff's employment. Plaintiff then commenced this action in U.S. District Court, claiming that he was wrongfully terminated in violation of his First Amendment rights and in violation of the WPA and the ELCRA. After the District Court stayed plaintiff's WPA claim, the jury returned a verdict in favor of defendants on plaintiff's claims under the First Amendment and the ELCRA. Following the verdict, the District Court dismissed plaintiff's WPA claim.

II. First Amendment Claim

Plaintiff claims that the District Court improperly instructed the jury on the law as it applies to his First Amendment claim. In its defense against plaintiff's claim, the City contended that plaintiff's speech made it difficult, if not impossible, for him to perform his employment duties. Plaintiff contends that the court should have instructed the jury that it could not base its verdict

on defendants' opinions and speculations as to the disruption plaintiff's speech caused, but should consider only proof of actual harm caused by the speech.

We review jury instructions as a whole to determine whether they "adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." Beard v. Norwegian Caribbean Lines, 900 F.2d 71, 72 (6th Cir. 1990). A party is not entitled to a new trial based upon alleged errors in the jury instructions unless the instructions, "viewed as a whole, were confusing, misleading, or prejudicial." Id.

For the speech of a public employee to be protected by the First Amendment, (1) the speech must be on a matter of public concern, and (2) the employee's interest in expressing himself or herself must not be outweighed by any injury the speech could cause to the "interest of the State, as an employer, in promoting the efficiency of the public services its performs through its employees". Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

Plaintiff claims that the District Court erroneously instructed the jury as to the City's burden of proof in satisfying the second element of this test. The District Court instructed the jury as follows:

> Now, the speech as such, of plaintiff, was on matters of public concern. If the speech of plaintiff interfered with the effectiveness of the City of Southfield's operations, or

> interfered with the performance of plaintiff's job duties, then it was -- it is not protected speech.
>
> In proving its assertion that plaintiff's speech disabled him from performing his job duties, the City, the defendant, must prove by a preponderance of the evidence, that the plaintiff's statements interfered with the effectiveness of the City of Southfield's operations, or in the performance of plaintiff's job.
>
> As to plaintiff's first claim, since his speech dealt with matters of public concern, defendant has the burden of proving, by a preponderance of the evidence, that his speech interfered with the effectiveness of its operations, or interfered with the performance of plaintiff's job.

Plaintiff contends that the jury instructions improperly permitted defendants to defeat a First Amendment claim solely on the basis of the state's opinion and conjecture as to the disruption caused by plaintiff's speech. Plaintiff urges us to adopt a rule requiring a public employer to demonstrate objectively that an employee's speech caused actual harm.

The Supreme Court recently indicated that potential disruption caused by a public employee's speech may be sufficient to outweigh the employee's interest in self-expression. Waters v. Churchill., 114 S.Ct. 1878 (1994) (plurality opinion). In Waters, the Court held that a public employee's speech was not protected by the First Amendment because "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." Id, at 1890 (emphasis added). The Court stated that because a government employee may have a strong,

legitimate interest in speaking out on public matters, the government employer "may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." Id. at 1887 (emphasis added).

Waters makes it clear, then, that a government employer need not prove actual disruption, but rather merely the likelihood of disruption. Indeed, the Court stated that it gives substantial deference to "government predictions of harm" even when the danger asserted "is mostly speculative." Id. at 1887 (emphasis added). A government employer is not required "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Connick, 461 U.S. at 152.

We hold, therefore, that the jury was entitled to consider defendants' opinions as to the disruptive effect of plaintiff's speech. Such opinions are relevant and could legitimately form the basis for the jury's verdict. The evidence presented by defendants was sufficient to support a finding that plaintiff's statements interfered with his ability to perform his job. We find no error.[2]

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[2] Remaining text of opinion omitted.

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NO. 96-1523

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WILLIAM E. FOSTER
Petitioner

v.

CITY OF SOUTHFIELD, a municipal corporation,
JANET TOBIN, Personal Representative of the
Estate of ROLLIN G. TOBIN, Deceased, and
ROBERT BLOCK,
Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI - APPENDIX B

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12-PP

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM E. FOSTER,

Plaintiff,

vs.

No. 92-75856

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK, its agents, officers and employees, jointly and severally,

Defendants.
_____/

MEMORANDUM AND ORDER

I.

This is an employment discrimination case tried to a jury. The background of the case and the issue tried is described in the Memorandum of June 14, 1994, a copy of which is attached. On August 4, 1994, after a twelve-day trial a jury found that

- plaintiff proved by a preponderance of the evidence that his public statements were a

substantial or motivating factor in the City of Southfield's (City) decision to terminate him.

- defendants proved by a preponderance of the evidence that plaintiff was unable to effectively perform his job duties or that the plaintiff's public statements interfered with the effectiveness of the City's operations.
- plaintiff did not prove by a preponderance of the evidence that defendants retaliated against him because of his engaging in activity protected under the civil rights law.

The jury attached to their verdict form a statement as follows:

> The way our verdict is stated, it may appear that we believe that the city is not without fault. Although we are not rewarding compensation to Mr. Foster, we feel that some city employees failed in their responsibilities as well. We hope the city looks at this statement we are making as an incentive to isolate and deal with the few individuals who are hindering the affirmative action program in the Fire Dept. as well as to encourage other city employees who are already working towards this end to continue to do so!

On August 9, 1994 a judgment dismissing the case was entered.

Now before the Court is plaintiff's motion for a new trial on a variety of grounds which will be only briefly discussed since the Court is satisfied that the motion should be denied. Plaintiff received a full

and fair trial. He had an opportunity to fully put his case to the jury. The jury was properly instructed. There are no good reasons to set aside the jury's decision.

II.

A.

Testifying at trial were John Harper, a management consultant employed by the City to assess its efforts to increase minority employment in the Fire Department; plaintiff; Kennedy Taylor, an African-American firefighter employed by the City; Valerie Crump, Equal Employment Opportunity Coordinator and personnel manager of the City; Robert Block, City Administrator; Edward DeLong, a Fire Captain; Robert Oyeas, a Fire Chief; Katherine McConnell, Civil Operations Director of the City; and David Greenwood, an African-American and one-time Fire Cadet in the City's Fire Department. Rollin Tobin, Director of Public Safety, who died prior to trial, testified through a deposition.

Numerous exhibits were received as evidence. They included evaluations, advertisements, memoranda, letters, transcripts and video tapes of new conferences broadcast on local television stations, and newspaper articles. The exhibits graphically displayed the problems the City had in recruiting minorities to work in public safety; the efforts made to employ minorities; employment of plaintiff; the course of his

employment; the difficulties encountered in integrating minorities in the Fire Department; and the actions of plaintiff which eventually caused his termination. The testimony of the witnesses and the exhibits combined to give the jury a complete picture of the relationship between plaintiff and defendants.

B.

The jury was instructed as follows:

1.

> There are three defendants in this case, the City of Southfield, which is a municipal corporation, Robert Block and the Estate of Rollin G. Tobin. For purposes of your verdict you are to treat all three defendants as a single defendant.

2.

> Plaintiff has two claims in this case. The first relates to his right of free speech under the First Amendment to the Constitution.

3.

> A public employee may express his or her views on matters of public concern in a manner which is protected by law. A public employer may not retaliate against a public employee if the employee has engaged in protected speech.

4.

A government unit such as the City of Southfield as an employer has a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large.

5.

In regulation of constitutionally protected speech a balance must be reached between the interest of the plaintiff, as a citizen, in commenting on matters of public concern and the interest of the City of Southfield, as an employer, in promoting the efficiency of the public services it performs through its employees.

6.

In proving its assertion that plaintiff's speech disabled him from performing his job, defendant must prove by a preponderance of the evidence that plaintiff's statements interfered with the effectiveness of defendant's operations or in the performance of plaintiff's job.

If the speech of plaintiff interfered with the effectiveness of defendant's operation or interfered with the performance of plaintiff's job then it is not protected speech.

7.

As to plaintiff's first claim, since his speech dealt with matters of public concern defendant has the burden of proving by a preponderance of the evidence that his speech interfered with the effectiveness of its operations or interfered with the

performance of plaintiff's job. This is the first part you must answer on the verdict form.

8.

As to plaintiff's second claim, it is unlawful for an employer to retaliate against an employee because the employee has opposed a violation of the civil rights law, or because the person spoke out, filed a complaint, or participated in an investigation or hearing under the civil rights law, or filed a lawsuit on his own behalf charging a violation of his civil rights

9.

In this case, the protected activities asserted by plaintiff are:

- Giving deposition testimony pursuant to subpoena in a civil rights lawsuit.

- Verbally opposing the violation of civil rights of minorities and women in the fire department.

- Filing a lawsuit under the civil rights law.

10.

In addition, plaintiff further contends that Defendant City of Southfield retaliated against him because of various statements he made or activity he engaged in which were protected by the civil rights laws. In order for plaintiff to prevail on his second claim he must prove by a preponderance of

the evidence:

(1) The activity he was engaged in was a protected activity.

(2) The activity was known to his employer, the City of Southfield.

(3) The City of Southfield took adverse action against Plaintiff by terminating him.

(4) That there was a causal link between the adverse action and the protective activity.

However, defendant City of Southfield asserts that it had a legitimate non-retaliatory reason for its adverse action against plaintiff. Therefore, plaintiff is required to rebut this by proving that: (a) the employer's acts were not a true reason but only a pretext and (b) the protected activity was a "significant factor" in Defendant employer taking the adverse action.

11.

A pretext is an explanation that does not convey the actual motivation or true reason for the decision.

The jury was also instructed on what is meant by a preponderance of the evidence.

III.

A.

Plaintiff says the instructions were inadequate and misled the jury as to what defendants had to prove. Plaintiff says it was reversible error for the Court not to instruct the jury that there must be "substantial" evidence that plaintiff's statements interfered with his effectiveness, that the defendants must have suffered "actual and significant harm", and that such "harm" must be "actual harm objectively determined and not merely on the basis of opinion and conjecture."

The Court is satisfied that the instructions as laid out in Part II.B. above fairly told the jury what they must find in order to answer the verdict form questions in favor of defendants and that plaintiff is really disputing sufficiency of the evidence at trial to support the jury's verdict. There was ample evidence at trial to support the jury's findings that plaintiff was unable to effectively perform his duties as Public Safety Reserve Coordinator/Fire Department once he had so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials. Plaintiff's alternative instructional language would not have led the jury to find otherwise.

B.

Plaintiff says that defendants' counsel's egregious conduct, particularly his opening and closing statements, denied him a fair trial. While defendants' counsel's statements in his opening and closing statements, as well as many of the questions he asked, left much to be desired, whenever plaintiff objected and the Court was of a view that the objection had merit the jury was either instructed to disregard the comment or defendants' counsel was admonished. The question to be answered is whether the errors complained of were harmless or whether they adversely affected substantial rights of plaintiff or improperly influenced the jury. In the context of the issues and evidence and trial the Court is satisfied plaintiff's rights were not substantially affected by the conduct of defendants' counsel and that there was no improper influencing of the jury.

C.

Plaintiff's third ground for a new trial relates to the matter of witnesses. Plaintiff was denied the right to call as witnesses persons who had nothing to do with plaintiff and his relationships with defendants. Plaintiff was also denied the right to ask questions of witnesses who were called relating to matters outside of plaintiff and defendants' relationships. Plaintiff's efforts with regard to witnesses not called and questions not asked because of the Court's rulings were

directed at portraying a hostile work environment for minorities in the City generally and an environment which justified plaintiff's public statements. Certainly the witnesses who were called and the questions they were allowed to answer made clear to the jury that there were difficulties with the City's efforts to increase minority representation in the Fire Department and that there was resistance to such efforts. Those efforts, as such, were not on trial. The excluded testimony was either irrelevant or cumulative.

D.

The last ground asserted is the Court's ruling bifurcating plaintiff's whistleblower claim under the Michigan Whistleblowers' Protection Act, MSA §17.428(1) et seq. This was not an error. It did not affect plaintiff's substantive rights. It was a matter committed to the discretion of the Court. Aside from the problematic nature of the claim, evidence on the claim would have been duplicative of the evidence on the claims tried. Given the jury's verdict, plaintiff had no whistleblower claim.

IV.

Plaintiff's motion for a new trial is DENIED.

SO ORDERED.

_____

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: December 1, 1994
Detroit, Michigan

(3)

FILED
APR 25 1997
OFFICE OF THE CLERK

No. 96-1523

In The

Supreme Court of the United States

October Term, 1996

WILLIAM E. FOSTER,

Petitioner,

vs.

CITY OF SOUTHFIELD, a municipal corporation, JANET TOBIN, Personal Representative of the Estate of ROLLIN G. TOBIN, Deceased, and ROBERT BLOCK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial established that Petitioner's comments caused actual and disruptive harm to the effectiveness of the city's operations, and Petitioner's assertions to the contrary are incorrect?

2. Whether the Sixth Circuit correctly applied the standard set forth in *Waters* to this matter?

3. Whether the circuits are consistently applying this Court's standard as set forth in *Waters*?

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Respondents, *City of Southfield, et al.*,[1] respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Sixth Circuit's Opinion below. That Opinion, was entered on December 20, 1996, is unreported, and has been reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

Petitioner William Foster's employment as Public Safety Reserve Coordinator/Fire Department was terminated after he continuously made public statements of unfounded racism and sexism within the City of Southfield's Fire Department. Such statements interfered with the City's operations and impaired Petitioner's ability to effectively perform his duties. Petitioner brought this action against his employer, City of Southfield, and two of its employees claiming that he was wrongfully discharged in retaliation for his exercise of his First Amendment rights and for engaging in activity protected under Michigan's Elliott-Larsen Civil Rights Act (hereinafter "ELCRA") and the Whistleblower's Protection Act[2] (hereinafter "WPA").

Trial commenced on July 12, 1994. The case was submitted to the jury on two claims: (1) termination in retaliation for free speech activity; and (2) ELCRA retaliation claim for opposing a violation of civil rights and participation in proceedings to vindicate rights. (Tr. 7/21/94, pp. 251-252). The court had earlier ruled that Petitioner's public statements touched on a matter of public concern.

After a 12-day trial, and after only one hour of deliberation,

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1. The full list of Respondents is included in the "Parties to the Proceeding" section of the petition for certiorari.

2. M.C.L.A. 37.2101, *et seq.* and M.C.L.A. 15.361, *et seq.*, respectively.

the jury returned a verdict for the Respondents finding that Respondents proved by a preponderance of the evidence that Petitioner was unable to effectively perform his job duties or that his statements interfered with the effectiveness of the City's operations. The jury also found that Petitioner did not prove by a preponderance of the evidence that Respondents retaliated against him because he engaged in activity protected under the civil rights law.[3]

The trial court thus entered Judgment in favor of the Respondents on August 9, 1994. (R:202). Petitioner's Motion for New Trial was denied on December 1, 1994. (R:211). Petitioner filed an appeal from the Judgment and the Order Denying Petitioner's Motion for New Trial with the Sixth Circuit Court of Appeals.

On appeal, Petitioner contended that the jury instructions improperly permitted Respondents to defeat a First Amendment claim solely on the basis of the City's opinion and conjecture as to the disruption caused by the Petitioner's speech and urged the appellate court to adopt a rule requiring a public employer to demonstrate objectively that an employee's speech caused actual harm. (Appendix to Petition, 6). The Sixth Circuit, applying the standard set forth in *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994), affirmed the trial court's jury instructions as correctly stating the standard and issued an unpublished opinion on December 20, 1996. (Appendix to Petition, 7).

Respondents submit that the Petition for Writ of Certiorari filed in this matter is without basis and should be denied.

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3. The trial court had stayed the WPA claim. After the jury returned a verdict in favor of Respondents on the Petitioner's claims under the First Amendment and ELCRA claims, the trial court dismissed the WPA claim. (Appendix to Petition, 4).

REASONS FOR DENYING THE WRIT

I.

THE EVIDENCE AT TRIAL ESTABLISHED THAT PETITIONER'S COMMENTS CAUSED ACTUAL AND DISRUPTIVE HARM TO THE EFFECTIVENESS OF THE CITY'S OPERATIONS, AND PETITIONER'S ASSERTIONS TO THE CONTRARY ARE INCORRECT.

In an effort to obtain review here, Petitioner has mischaracterized the nature of the question presented. The Petitioner's question presented suggests that Respondents offered absolutely no evidence at trial of the *actual* disruption caused by Petitioner's statements. However, the jury's verdict indicated that the Respondents had proven by a preponderance of the evidence that Petitioner was unable to effectively perform his job duties or that the Petitioner's public statements interfered with the effectiveness of the City's operations. (Appendix B to Petition for Writ, Memorandum and Order dated December 1, 1994, p. 2).

At trial, the jury heard evidence and testimony from several witnesses, saw and read the newspaper articles where Petitioner was quoted and saw the actual video tapes where Petitioner made the comments in question. (Appendix B, p. 2). The jury was also made aware of the City's efforts to integrate its Fire Department, and gained a complete picture of the relationship between Petitioner and the City, and its employees and department heads, and the disruptive effect the Petitioner's speech had on the City, its employees and their ability to carry out their functions.

Even so, both the District Court and the Sixth Circuit found that Respondents had presented sufficient evidence of actual disruption to the City's operation:

> The evidence presented by Defendants was sufficient to support a finding that Plaintiff's statements interfered with his ability to perform his job.

(Appendix to Petition, p. 7).

The District Court also found that Respondents produced substantial evidence to support the jury finding that "Plaintiff was unable to effectively perform his job duties" and "that the Plaintiff's public statements interfered with the effectiveness of the City's operations":

> There was ample evidence at trial to support the jury's findings that Plaintiff was unable to effectively perform his duties as Public Safety Reserve Coordinator/Fire Department once he had so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials.

(Appendix B, p. 8).

Despite Petitioner's arguments and assertions to the contrary, the Respondents presented substantial, overwhelming and compelling evidence that Petitioner's speech caused a disruption by impeding his ability to perform his job of recruiting minorities into the Fire Department and by interfering with the operations of the City. Thus, the verdict rendered by the jury was supported by evidence of the actual and disruptive harm to the effective operation of the City's services, and Petitioner's assertion to the contrary is incorrect.

II.

THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARD SET FORTH IN *WATERS* TO THIS MATTER.

In *Waters, supra,* this Court clearly enunciated the applicable First Amendment standard to determine whether an employee's speech is protected:

> To be protected, the speech must be on a matter public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

114 S. Ct. 1884.

The *Waters* plurality held that the government could fire an employee for disruptive speech based on the government's reasonable belief of what the employee said, regardless of what was actually said. In the instant case, there was no dispute as to what the Petitioner said, and, therefore, this part of the holding is inapplicable.

However, the *Waters* Court, applying the *Pickering*[4] balancing test held that Churchill's speech was unprotected because "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had." 114 S. Ct. at 1890. The relevant factors to

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4. *Pickering v. Bd. of Education of Township High School District,* 391 U.S. 583, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

consider under the *Pickering* balancing test include: (1) the impact of the speech upon co-worker harmony; (2) whether the speech impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise; and (3) whether the statement interferes with the public employee's functions. *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987). The Court in *Waters* concluded that because a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters, the government employer "may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." *Id.* at 1887.

The Court in *Waters* recognized that greater deference must be given to the government when it acts as an employer rather than as a sovereign. It stated:

> [W]e have given *substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern,* and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

114 S. Ct. at 1887. (Emphasis added).

The *Waters* Court acknowledged that different standards must exist for review of the restraint of speech by the government as an employer than by the government as sovereign. 114 S. Ct. 1887. The government as an employer must have the power and ability to make efficient employment related decisions in order to assure its effective operation:

> The key to First Amendment analysis of government employment decisions, then, is this: the government's interest in achieving its goals as effectively and efficiently as possible is elevated for a relatively subordinate interest when it acts as sovereign to a significant one when its acts as employer. The government cannot restrict a speech of the public at large just in the name of efficiency. *But where the Government is employing someone for the very purpose of achieving its goals, such restrictions may well be appropriate.*

114 S. Ct. at 1888. (Emphasis added).

Respondents, as City and public servants, have a duty to the public in general and its citizens in particular to provide certain services. Petitioner was hired to efficiently and effectively aid Respondent in the successful delivery of the services, namely, to recruit minorities into the Fire Department, and was paid a salary to do so. Petitioner's second public television speech, on the steps, and in City Hall, detracted from the effective operation of City services. Additionally, Petitioner's repeated denunciations of his employer and co-workers effectively destroyed the relationship between Petitioner and the other department heads he was required to work closely with to effectuate the City's goals and services. Respondents had no choice but to restrain Petitioner. Any interest Petitioner as a citizen may have had in expressing himself on a matter he perceived to be of public concern was decisively outweighed by the City's interest as Petitioner's employer in maintaining control, discipline, and cohesion in the effective operation of the City's goals and services.

The standard Petitioner urges this Court to adopt would undo well established precedent of this Court, and severely undermine a government's ability as an employer to perform its duties, deliver its services, and manage its employees.

The Sixth Circuit properly looked at what Petitioner said, and how he said it, to affirm the jury's determination that Petitioner's speech caused a disruption by impeding his ability to perform his job and by interfering with the City's operations. The Sixth Circuit correctly applied this Court's holding in *Waters* to the instant matter, and the Petition should be denied.

III.

THE CIRCUITS ARE CONSISTENTLY APPLYING THIS COURT'S STANDARD AS SET FORTH IN *WATERS*.

Petitioner urges that his Petition must be granted because the various Circuits are interpreting *Waters* differently. This is a mischaracterization and an improper attempt to obtain review in this matter where review is unnecessary and inappropriate. All the cases that Petitioner has cited follow *Waters* and indicate that the government employer must have a reasonable basis for its actions.

In *Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 173 (1995),[5] the Second Circuit in applying *Waters*, held, that the University employer did not violate the First Amendment rights of a professor by reducing his term as department chair because of controversial speech, since they were motivated by the reasonable prediction of disruption to University operations. In its original decision, the Second Circuit held that the mere reasonable belief that speech

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5. Petitioner's Petition makes no reference to this Court's denial of Certiorari.

would interfere with the employer's operations was not enough to discipline an employee, unless the employee held a high level, policy-making position. *See Jeffries v. Harleston,* 21 F.3d 1238, 1246-47. The Supreme Court, __ U.S. __, 115 S. Ct. 502, 130 L. Ed. 2d 411, granted certiorari, vacated and remanded the matter for consideration in light of *Waters, supra.*

On remand, the *Jeffries* Court found that because the defendants had made a substantial showing at trial that their decision to limit Jeffries' term was based upon a reasonable prediction that the Albany speech would disrupt University operations, the District Court judgment was reversed. The *Jeffries* Court found that the government's burden was to make a substantial showing of likely interference and not actual disruption. *Jeffries, supra,* 52 F.3d at 13 *citing Waters, supra,* 114 S. Ct. at 1887. Commenting on *Waters,* the Court in *Jeffries* properly concluded:

> Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if:
>
> (1) the employer's prediction of disruption is reasonable;
>
> (2) the potential disruptiveness is enough to outweigh the value of the speech; and
>
> (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Jeffries, 52 F.3d at 13.

In the instant case the jury read the newspaper articles, saw the video tapes and heard the testimony of the witnesses and concluded that Petitioner was unable to effectively perform his job duties or that his statements interfered with the effectiveness of the City's operations. The jury also found that the Petitioner had failed to prove that the Respondents retaliated against him because he engaged in protected activity. (Appendix to Petition, p. 4).

In *Campbell v. Towse*, 99 F.3d 820 (7th Cir. 1996), *cert. denied*, __ U.S. __, __ S. Ct. __, 137 L. Ed. 2d 334, 65 U.S.L.W. 3630 (March 17, 1997),[6] the Seventh Circuit correctly applied *Waters* in determining whether the speech in question, that motivated the employer's reprimand, addressed matters of public concern and, if so, whether the speaker's interest in his expression was "outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Campbell, supra*, 99 F.3d at 826. Once it determined that the speech in question focused on a matter of public concern, the *Campbell* court then turned to the question of whether the speech so undermined the Police Department's interest in avoiding the disruption of its command structure that the Police Chief's suspension of Campbell was permissible under the First Amendment. 99 F.3d at 828.

The Seventh Circuit court, in making that determination, looked to such factors as the reasonable likelihood that the speech would create problems in discipline or cause disharmony, whether the employment relationship ostensibly undermined by the speech, was one where personal loyalty and conflict are established, and whether the speech impeded the employee's ability to perform his duties. 99 F.3d at 829.

The court found determinative, in viewing the entire context in which the underlying dispute arose, that Campbell's

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6. Petitioner's Petition again makes no reference to this Court's denial of Certiorari.

insubordinate attitude and behavior amounted to more than a philosophical disagreement sufficient to cause the Police Chief to not only lose confidence in the police officer but also to doubt his loyalty. *Id.* at 829. In concluding that Campbell's suspension by the Police Chief did not violate Campbell's First Amendment rights, the Seventh Circuit held that any interest Campbell had in expressing himself as he did was outweighed by the Police Chief's interest in maintaining control and discipline over the department and preserving both departmental discipline and cohesion. *Id.* at 830.

In the instant case, Respondents produced evidence sufficient to support the jury's finding that "Plaintiff was unable to effectively perform his job duties" and "that the Plaintiff's public statements interfered with the effectiveness of the City's operations." Specifically, the trial court noted that Petitioner was unable to effectively perform his job duties once he so bitterly and pervasively attacked the City officials with whom he was required to work and had denigrated the motives and efforts of these officials. (Appendix B, p. 8).

In *Andersen v. McCotter,* 100 F.3d 723 (10th Cir. 1996) the Tenth Circuit, as well, consistently applied *Waters.* The Tenth Circuit concluded that defendant had offered no evidence of potential disruption, but had merely pointed to its code of conduct for the proposition that the speech in question interfered with the regular operations of the department, and had thus not met its burden to justify the challenged discharge on legitimate grounds.

The Tenth Circuit, in holding that defendant had failed to sustain its burden, has shown that the Circuits are not interested in merely rubber stamping the employment-related decisions of the government employer. As Petitioner is undoubtedly aware, the Circuits are not split. Rather, the Circuits are merely probing

into these employment related decisions to verify that there exists a reasonable basis for the prediction of disruption upon which the decision was based and will not tolerate situations where this burden has not been met.

Similarly, in *Watters v. City of Philadelphia,* 55 F.3d 886 (3rd Cir. 1995) the court found that the employee's statements, which touched on a matter of public concern were protected speech because the department's interest did not outweigh the employees. In reaching this conclusion, the Circuit found determinative that nothing the plaintiff in *Watters* was reported to have said impugned the integrity of his superiors, that the plaintiff in *Watters* had made similar comments in a previous article and the City never claimed any disruption from these comments, and there was no evidence that the plaintiff in *Watters* engaged in the type of complaining and negative criticism of his supervisors within the workplace, that this Court found likely to disrupt the working relationships as in *Waters.*

In reaching this decision, the Third Circuit in *Watters* first looked to *Waters* for the appropriate analysis and standard and then to *Rankin, supra* to list the relevant factors to establish the defendant's contention of disruptiveness. The Court then determined that the trial court had failed to review or analyze any factors as propounded in *Waters* or *Rankin*, but instead had focused solely on *Watters'* use of the word "crisis" in the article and in his testimony.

The *Watters'* decision is clearly factually distinguishable from both the instant case and the cases from the other Circuits. In the instant case, Respondents have presented strong, ample and compelling evidence that the Petitioner's speech caused a disruption by impeding his ability to perform his job of recruiting minorities into the fire department and by interfering with the operations of the City. The jury believed the Respondents' witnesses, as did both the District Court and the Sixth Circuit.

In *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir. 1995), the Tenth Circuit, consistent with *Waters*, concluded that *Moore*'s interest in voicing his opinion about a fellow police officer and the police department's race relations problems at a city council meeting, while in uniform and on duty, did not outweigh the defendant's interest in controlling not only who purports to speak on behalf of the city, but also in safeguarding the operations of the department. The Tenth Circuit stated that there is no requirement for the government as an employer to be compelled to wait for a speech to actually disrupt core operations before taking action, as long as the government's concerns about the speech are reasonable and formed in good faith.

In *Moore*, the Tenth Circuit found significant the close working relationships within the small, six-member department. In the instant case, the jury heard testimony from the City Manager, Public Safety Director, Personnel Manager, Fire Chief, and Civilian Operations Coordinator, who were all required to work closely with Petitioner in the implementation of the fire reserve and cadet programs. Each witness testified that Petitioner's speech totally disrupted their ability to work with him in trying to implement the City's goals and programs.

In *Wright v. Illinois Dept. of Children and Family Services*, 40 F.3d 1492 (7th Cir. 1994), the Seventh Circuit concluded that the instances of speech which in part formed the basis of lawsuit were not expressions on matters of public concern. Because the trial court had concluded that Petitioner's speech did not touch upon matters of public concern, this holding in *Wright* is inapplicable to the instant case.

A review of all the cases cited by Petitioner demonstrates that the Circuits are consistently applying the standards and analysis set forth in *Waters* and are placing on the government

employer, relative to its employment related decisions, the burden to establish a reasonable basis of the potential for disruption before allowing the government as an employer to restrict the speech of an employee. For instance, the Second Circuit correctly applied these standards in *Jeffries* when it reversed its prior ruling in light of this Court's decision in *Waters*. The Sixth Circuit has correctly done so in the instant matter as well.

Petitioner has not shown any real, or perceived, conflict between the decisions below and any opinions of other Circuits or this Court. The arguments are frivolous and absolutely devoid of merit.

Furthermore, Petitioner has not shown any reason to do away with the standard and analysis this Court has established in *Waters*.

CONCLUSION

The Petition for Certiorari filed in this matter is without basis and should be denied.

Respectfully submitted,

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